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IN THE

# Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

*Petitioner*,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## REPLY IN SUPPORT OF CERTIORARI

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The brief of the private respondents (hereafter "respondents") in opposition to certiorari is striking primarily for what it does not dispute. Respondents do not deny that the decision below precludes a court, in determining whether a government property interest gives rise to a traditional public forum, from inquiring into the government's intent or the character of the surrounding property. That prohibition stands in stark contrast to the Second Circuit's decision in *Hotel Employees* v. *New York*, 311 F.3d 534 (2d Cir. 2002), which mandates precisely those inquiries. Nor do respondents dispute that the decision below squarely conflicts with the Nevada Supreme Court's decision in *S.O.C., Inc.* v. *Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001), on the issue of whether any walkway on *private* property can be deemed a public forum for First Amendment purposes. Nor do respondents dispute that, depending on how this Court resolves *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003), a decision there could warrant, at a minimum, vacating and remanding the decision below.

Instead, respondents attempt to minimize the practical significance of these issues and of the decision below. However, as shown below and in the briefs of respondent Salt Lake City and the various *amici curiae*,[1] that effort, and respondents' distortions of other key decisions, merely underscore the need for this Court's review.[2]

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[1] Briefs supporting the petition have been filed by respondent Salt Lake City, The National League of Cities et al. ("Municipalities Brief"), a number of states ("States Brief"), The National Council of Churches et al. ("Churches Brief") and The Venetian Casino ("Venetian Brief").

[2] Without disputing that the decision below is final, respondents also argue that review should be denied because the parties may disagree over the practical implications of the decision, and because a settlement has been proposed. Brief in Opposition ("BIO") at 4 n.1. But the City's brief in support of the petition makes clear that it agrees with petitioner on the issues that are germane to this Court's decision on *certiorari*. *See* City Br. at 1-3. Moreover, the fact that the parties are attempting to resolve this litigation through settlement is no reason to deny the petition. Indeed, the

## I. THE DECISION BELOW CONFLICTS WITH THE SECOND CIRCUIT ON HOW TO APPLY PUBLIC FORUM ANALYSIS TO PROPERTY SUBJECT TO PUBLIC ACCESS RIGHTS.

As explained in the petition (at 8-14), the conflict between the decision below and the Second Circuit's decision in *Hotel Employees* lies in the different legal analyses applied to determine whether government-owned property will be treated as a traditional public forum. And, as respondents do not dispute, the decision below focused narrowly on the character and use of the property interest at issue. Pet. 11-14. Concluding that the public access easement here served the same purpose as the former public sidewalks, the Tenth Circuit held that the district court erred when it looked to the surrounding locale and the City's purposes in retaining the public access easement. See Pet. App. 21a-22a, 26a-28a.[3] By contrast, in *Hotel Employees* the Second Circuit engaged in precisely the type of broad analysis rejected by the Tenth Circuit. The Second Circuit based its decision on (a) the characteristics of the surrounding locale and how the government property fits into that locale, (b) the government's intent, and (c) the primary use and function of the property, as informed by the property's location and governmental intent. See Pet. 9-11. Respondents' attempts to

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City Planning Commission recently voted to reject the proposed settlement. Heather May, *Planners Reject LDS Plaza Deal*, Salt Lake Trib. at B-1 (Apr. 10, 2003). Although not binding on the City Council, which makes the final decision, the vote demonstrates substantial uncertainty as to whether the proposed settlement will ultimately be approved.

[3] Contrary to respondents' repeated suggestions, the Tenth Circuit did *not* hold that the City's property right was a classic "sidewalk easement" of the sort that developers grant to municipalities in lieu of deeding fee title. Here, the City retained an extremely limited use easement, *i.e.*, for public "access and passage only.". Pet. App. 87a. In contrast to a typical sidewalk easement, this limited easement has no metes and bounds, and the Church retains the right to direct pedestrian traffic across any area of the Plaza, provided passage is not unreasonably hindered. *Id.* at 89a.

avoid this conflict either distort or ignore key aspects of the Second Circuit's decision.

1. Respondents do not even address the major source of conflict between the Second and Tenth Circuits, which concerns the role of the property's location in the public forum analysis. Pet. 8-14. Respondents do not dispute that, under the Second Circuit's decision, a court undertaking a public forum analysis is *obligated* to consider all "relevant factors," including the property's "location" and (equivalently) "'how the locale is used.'" 311 F.3d at 552, 547. Nor do respondents dispute that, under the Tenth Circuit's analysis, by contrast, a court is *forbidden* to engage in that very inquiry because, according to that court, "it is the purpose of the . . . property that is a forum of some type, and *not* the purpose of . . . the surrounding property, that is at issue." Pet. App. 22a (emphasis added). By itself, the conflict on this important issue warrants this Court's review.

2. Respondents also provide precious little response to the second major area of conflict between the Second and Tenth Circuits. In a lone footnote (BIO at 11 n.3), respondents concede, as they must, that the Tenth Circuit expressly refused to consider the City's intent in creating the easement when determining whether it gives rise to a public forum. They also concede that in *Hotel Employees*, the Second Circuit, unlike the Tenth Circuit, expressly "weighed this factor" in its analysis of the public forum status of the Lincoln Center Plaza. *Id.*

Despite this obvious difference, respondents cryptically assert that there is no conflict "because Lincoln Center did not involve a traditional public forum." *Id.* (citing 311 F.3d at 551 n.12). If by this respondents mean that the Second Circuit's decision was based on something other than a traditional public forum analysis (*e.g.*, a designated or limited public forum analysis), respondents are incorrect. The Second Circuit's decision is clear: the court analyzed government intent *only* in its traditional public forum

analysis, see 311 F.3d at 552 ("we reject the . . . argument that the Plaza [is] a traditional public forum"), and "le[ft] for another day" the question whether the Lincoln Center Plaza constitutes a limited public forum, see *id.* at 553.

On the other hand, if respondents mean that the Second Circuit "weighed" government intent only because the plaza had not *historically* been labeled a traditional public forum, that merely reinforces the conclusion that the two decisions are in direct conflict. As the Second Circuit acknowledged, consideration of government intent would not be appropriate if the government were simply trying to "alter by fiat what is *indisputably* a traditional public forum" – such as a street or park that has "historically been open to all types of expression." *Id.* at 551 n.12 (emphasis added). However, where (as in that case) the proponent of a public forum argues by analogy – *i.e.*, that the public property is functionally similar to property that has traditionally been considered a public forum – consideration of the govern-ment's intent is essential. *Id.*

Under that principle, the City's intent clearly should have been considered in this case. It is undisputed that the government's easement did not even come into existence until the underlying property was sold to the Church. It is also undisputed that the public forum that existed on the property before the Church purchased it – a four-lane street with accompanying sidewalks – was closed, totally destroyed, and reconstructed into a religious plaza which "fits seamlessly" into the surrounding Church campus. Pet. App. 6a. Thus, as in *Hotel Employees*, no one could plausibly argue that the easement itself, running across a newly constructed religious plaza, had historically constituted a public forum. The Tenth Circuit's refusal to consider the City's intent is therefore in plain conflict with the very portions of the *Hotel Employees* decision cited by respondents.

3. Virtually all of respondents' analysis is directed to the third distinct area of conflict, namely, the use and major

function of the property. In that regard, respondents rely primarily on the Second Circuit's conclusion that the ability of pedestrians to use the Lincoln Center Plaza as a "'shortcut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex.'" BIO at 10 (quoting 311 F.3d at 550). But even on this point, the decision below conflicts starkly with the Second's Circuit's analysis of the *manner* in which a property's principal function and use is to be determined.

Under the Second Circuit's approach, as explained in the petition (at 9-11), the property's principal use must be evaluated in light of all relevant circumstances, taking into account the government's intent and the locale's attributes and uses. See 311 F.3d at 550-52; *supra* 2-3. By contrast, under the Tenth Circuit's approach, the property's principal use is to be determined in a virtual vacuum. See Pet. 11-14; *supra* 2-3. Thus, the Tenth Circuit analyzed the use and purpose of the easement without reference to the Plaza itself, the surrounding Church property, or the government's intent. See Pet. App. 22a, 28a. Its constricted analysis also prohibited it from weighing, as the Second Circuit did, whether the public would perceive the property as a traditional public forum or instead, as the Second Circuit put it, as more of a "'special type of enclave'" separate and apart from generally recognized areas of free speech. 311 F.3d at 550 (quoting *United States* v. *Grace*, 461 U.S. 171, 180 (1983)).

As a result of this narrow focus, the Tenth Circuit simply ignored the evidence showing that the principal purpose of the easement was not so much to *accommodate* the existing flow of pedestrian traffic from one side of Main Street to the other, but rather to *influence* the flow of traffic on a permanent basis by funneling tourists visiting Church sites from the Plaza into the downtown business district. See Summ. J. Mot. ¶ 44 (quoting deposition of City administrator regarding City's purpose for securing easement); Pet. App. 51a-52a (describing principal uses of Church Plaza). Thus,

the court's refusal to consider "the surrounding property" (*id.* at 22a) or "the government's intent" (*id.* at 15a) blinded the court to the truth about the principal use and purpose of both the Plaza and the easement. Had the court considered those factors in determining the easement's principal function and use, it could not avoid the conclusion that pedestrian passage from one side of the Plaza to another was, at best, an incidental function, as the Second Circuit concluded in *Hotel Employees*.

In short, *Hotel Employees* cannot be distinguished from the decision below based on the proposition that pedestrian access was an "incidental" use in the one case but the "principal" use in the other.[4]

## II. THE DECISION BELOW CONFLICTS WITH A BINDING NEVADA SUPREME COURT DECISION AS TO WHETHER A PRIVATE WALKWAY CAN BE A PUBLIC FORUM.

As explained in the petition, this case also gives the Court

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[4] For the same reason, respondents are incorrect in relying upon the parenthetical in *Hotel Employees* summarizing the Tenth Circuit's conclusion that the purpose of the easement here was "'to "preserve and enhance . . . the pedestrian grid."'" BIO at 11 (quoting 331 F.3d at 552). Even if one assumes that this reference was intended to harmonize the two decisions – an assumption nowhere validated in the opinion – respondents' reliance on it begs the question of whether the legal analysis by which the Tenth Circuit reached that conclusion conflicts with the legal analysis used by the Second Circuit.

The conflict, moreover, cannot be avoided by recharacterizing the Tenth Circuit's conclusions as "findings." *See* BIO at 2, 3, 12, 16, 17. Appellate courts have no authority to make purely factual "findings."

Nor can the two decisions be harmonized by pointing to the Second Circuit's conclusion that the plaza forecourt in that case "'does not form part of the City's transportation grid in the way that traditional streets and sidewalks do.'" *Id.* at 10 (quoting 311 F.3d at 550). The Second Circuit never held, or even suggested, that this fact was dispositive. Instead, it was simply one aspect to consider in analyzing the property's function and purpose, which in turn was only one of three factors that the court considered in its traditional public forum analysis. *See* 311 F.3d at 552.

an opportunity to resolve a direct conflict with the Nevada Supreme Court's decision in *S.O.C., Inc.* v. *Mirage Casino Hotel*, 23 P.3d 243 (Nev. 2001), on the question of whether a private walkway can constitute a public forum. Respondents do not dispute that the decision below conflicts with the *Mirage* decision. Neither of their proposed reasons for ignoring that conflict passes muster.

First, contrary to respondents' suggestion, a conflict between a state supreme court and a federal court of appeals is clearly "the type" (BIO at 15) that warrants this Court's review. See Sup. Ct. R. 10(b). That conclusion is not undermined by the fact that the *Mirage* decision arose out of a preliminary injunction, or that Nevada lies in the Ninth Circuit, not the Tenth. See BIO at 15. Indeed, as one *amicus* has shown, the Ninth Circuit's decision in *Venetian Casino Resort, L.L.C.* v. *Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002), also squarely conflicts with the *Mirage* decision. Venetian Br. at 6-8.

Second, contrary to respondents' suggestion (BIO at 15), the fact that the principal opinion in *Mirage* did not command the votes of four justices also does not diminish the need for this Court's review. Respondents do not dispute that the *Mirage* decision has been relied upon by the local federal district court as binding precedent. See Pet. 15 n.5 (citing *Southwest Adver., Inc.* v. *County of Clark*, 202 F. Supp. 2d 1141, 1145 (D. Nev. 2002)). Moreover, as that decision illustrates, a plurality opinion of the Nevada Supreme Court must be followed until overturned under the principle announced in *Craigo* v. *Circus-Circus Enterprises Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990).

Here, respondents do not dispute that the principal opinion in *Mirage* announced the court's judgment, was joined by more members of the court than any other opinion, and was assumed by both the concurrence and the dissent to constitute a "majority" holding. See Pet. 15-16 & n.5. Thus, under the precedential principle articulated in *Craigo*, *Mirage*

constitutes binding Nevada law unless and until it is overturned.[5]

## III. *HICKS* ILLUSTRATES THE NEED FOR FURTHER GUIDANCE ON WHEN A GOVERNMENT CAN CLOSE A PUBLIC FORUM.

This case also merits plenary review because it, like *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003), raises the important issue of how a government may close a public forum. Pet. 17-19. Respondents do not dispute this. See BIO at 16; see also ACLU *Hicks* Br. at 2-4; U.S. *Hicks* Br. at 11 & 29-30. Nor do they dispute that, if *Hicks* were to address the issue, that decision would likely provide guidance in this case. Given these undisputed points, this case should be held for *Hicks* if it is not granted immediately.

If the Court does not address the public forum closure issue in *Hicks*, however, this case provides an appropriate vehicle to do so. Indeed, respondents' own counsel, Mr. Lopez, recently stated that this case properly presents "'an opportunity to have a full and candid debate in front of the court about the circumstances under which what was indisputably a public forum can be closed.'" Heather May, *ACLU Urges High Court to Reject Plaza Case*, Salt Lake Trib. at B-3 (Apr. 12, 2003).

None of respondents' arguments can overcome this candid admission. First, contrary to respondents' suggestion, there is

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[5] Respondents point out that *Craigo* was a plurality opinion, and that one justice disagreed with the principle articulated there. BIO at 15 n.4. Even so, three Nevada supreme court justices and one local federal district judge are better positioned than respondents to assess the precedential effect of a Nevada plurality opinion. Those judges all agree that a decision like the *Mirage* plurality would be binding in the Nevada courts.

*Coughlin* v. *Tailhook Association*, 112 F.3d 1052, 1056 (9th Cir. 1997), *cited at* BIO 15 n.4, is not to the contrary. As the Ninth Circuit noted there, *Craigo*'s substantive ruling was no longer binding at the time of the *Coughlin* decision because *Craigo* had been *twice* overturned, first by a Nevada Supreme Court decision, and then by legislation.

no need to wait for "a case in which there has been an *unencumbered* transfer of title from public to private ownership." BIO at 16 (emphasis added). Nothing in Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc.* v. *Lee* suggests that the validity of a closure through a sale depends on whether the sale is encumbered or not. 505 U.S. 672, 699-700 (1992). Moreover, as explained by *amici*, sales of public property are routinely "encumbered" by easements or other conditions. Municipalities Br. at 1-2, 9-10; States Br. at 2-4.

Second, contrary to respondents' argument, the suitability of this case for addressing the closure of a public forum is not undermined by the unsupported assertion that the walkways on the Plaza here "continue to serve as a pedestrian throughway for downtown commuters, shoppers, and visitors." BIO at 18. Like the Tenth Circuit, respondents apparently believe that *any* property that retains "the essential form and function of municipal sidewalks," *id.* at 17, necessarily remains a public forum, even after a sale to a private entity. See *id.* But that dubious position contradicts the thrust of Justice Kennedy's concurrence in *Lee*; has never been adopted by a majority of this Court; and is flatly contrary to the Nevada Supreme Court's decision in *Mirage*.

## IV. AS THE AMICUS BRIEFS CONFIRM, THE DECISION BELOW HAS SWEEPING IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS AND FOR CHURCHES.

Respondents also incorrectly argue that this case does not warrant the Court's attention because it is "virtually unique" among public forum cases (BIO at 1) and "involves Main Street and nothing more," *id.* at 19. This is belied by the Tenth Circuit's sweeping language, which expressly extends to all "downtown public spaces conducive to expressive activities." Pet. App. 28a. It is also belied by respondents' own sweeping contention that the decision "ensures that *municipalities* [and, presumably States] do not surrender the

public's First Amendment rights . . . for other public benefits such as urban renewal or, as here, revenue from the sale of public property." BIO at 19.

Respondents' attempt to minimize the Tenth Circuit's decision is further undermined by the supporting *amicus* briefs. As explained by the Municipalities and the States, the decision casts a long shadow on many other transactions throughout the Tenth Circuit and, indeed, the nation, in which governments sell public property to a private entity subject to an easement for public passage or for other important public purposes. See Municipalities Br. at 1-2, 9-10; States Br. at 2-3. In addition, as explained by the Churches, numerous religious organizations have entered into similar property transactions with local governments, transactions that could all be invalidated under the Tenth Circuit's approach. See Churches Br. at 4-6.[6]

## CONCLUSION

For these reasons, and for those explained in the petition and the briefs of *amici*, a writ of *certiorari* should be granted. In the alternative, the petition should be held pending a decision in *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003).

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[6] As explained in the petition (at 20-21), the decision below also raises serious Establishment Clause concerns because the City is now forced to regulate speech on a religious plaza created by a single religious denomination. *See* Municipalities Br. at 11-12; Churches Br. at 10. Respondents attempt to minimize these obvious problems by arguing that the situation here is no different than the regulation of speech "on the streets and sidewalks that run past the local church or synagogue." BIO at 21. But that ignores the undisputed evidence that the pathways at issue here do not simply "run past" the Church's key religious sites; they run through the middle of what is now a Church-owned religious plaza – a plaza which fits seamlessly into the Church campus and which borders it on virtually every side. *See* Pet. App. 98a-106a (pictures and maps of current plaza). By requiring the City to regulate speech on the Plaza in those circumstances, the Tenth Circuit has created enormous risks of entanglement, not to mention endorsement by the City of the Church's religious message.

Respectfully submitted,

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